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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES

AND

ALBERT G. GILES,

Appellants,

VS.

LEONARD PAUL HODORY,

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF APPELLANT

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ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF APPELLANT

Opinion Below

The Opinion of the District Court [reproduced in the Appendix to the Brief of Appellant] is reported at 408 F. Supp. 1016

JURISDICTION

The judgment and opinion of the United States District Court for the Northern District of Ohio, Eastern Division was entered on March 4, 1976. The Jurisdictional Statement of the Appellant was filed on May 25, 1976 and Probable Jurisdiction was noted on October 4, 1976. The jurisdiction of this court rests on 28 U.S.C. 1253.

STATUTE INVOLVED

The applicable statutory provision involved in this appeal is Section 4141.29(D)(1)(a) Revised Code of Ohio. Section 4141.29 Revised Code of Ohio is set forth in its entirety in the Appendix to Appellant's Brief.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Is Ohio's labor dispute disqualification as in effect at the time of the labor dispute in question in conflict with the Federal Social Security Act?

(2) Can a state system of Unemployment Compensation predicate disqualification from benefits on grounds other than fault?

(3) Was there a suitable governmental interest underlying the Ohio "Labor Dispu " disqualification as in effect at the time of the strike such that Section 4141.29(D)(1)(a) was not unconstitutional as applied to Leonard Paul Hodory and those similarly situated?

(4) Is the decision of the Three Judge District Court in conflict with other jurisdictions and against the weight of authority?

(5) Does the decision of the Three Judge District Court deprive the respective employers of their substantive and procedural due process rights under the 5th and 14th Amendments?

STATEMENT OF THE CASE

This case involves the constitutionally of Section 4141.29(D)(1)(a), Ohio Revised Code, which contains essentially the same language as the original statute enacted in 1936.

Several amendments to the statute have been made for clarification purposes, but the wording contained in (D)(1)(a) has been in effect since 1963.

This section disqualifies a claimant from receiving unemployment benefits when he becomes unemployed due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed. An individual is disqualified in cases where his unemployment is caused by a labor dispute at another place, either within or without this state, if owned or operated by the same employer and which supplies materials or services necessary to continue the operation of the individual claimant's last place of employment.

Plaintiff-appellee was one of more than twelve hundred fifty steelworkers furloughed by United States Steel Corporation and Republic Steel Corporation as a result of a national strike by the United Mine Workers at coal mines owned and operated by both steel companies. These company owned mines supplied fuel for the operation of the various facilities engaged in the manufacturing of steel products owned and operated by U.S. Steel Corporation and Republic Steel Corporation in Ohio which were forced to shut down due to the lack of fuel.

A large number of other steel workers employed by U.S. Steel Corporation and Republic Steel Corporation at other Ohio facilities were also affected by the strike, and perfected their appeal to the Ohio Bureau of Employment Services pursuant to Section 4141.28, Ohio Revised Code. The Bureau, upon hearing evidence from all concerned parties, granted benefits to these employees on the basis that the company owned coal mines did not supply a sufficient amount of fuel to effect a plant shut down. The Steel companies are appealing these decisions in the state courts.

Plaintiff-appellee and his co-workers filed applications for unemployment benefits with the Ohio Bureau of Employment Services which were disallowed for the reason that the labor dispute at the coal mines owned and operated by United States Steel Corporation was the cause of the claimant being unemployed. The decision of the Ohio Bureau of Employment Services wherein the plaintiffs-appellees were disqualified from receiving benefits was consistent with previous Bureau and Board of Review decisions, case law in Ohio, as stated in *Cornell* v. *Bailey*, 163 Ohio St. 50, 25 N.E. 2d 323 (1955) and *Adamski* v. *Bureau of Unemployment Compensation*, 108 Ohio App. 82, 155 N.E. 2d 518 (1959) and in other states having the same or similar disqualifications. *Abernathy* v. *Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d 292 (1963) Certiorari denied, U.S. Sup. Ct. 375 U.S. 161 (1963); *Spielmann* v. *Industrial Commission*, 236 Wis. 240, 295 N.W. 1 (1940); *Chrysler Corp.* v. *Smith*, 297 Mich. 438, 298 N.W. 87 (1941). These appeals are now pending before the Board of Review but are being stayed pending a final decision in this case.

Plaintiff-appellee, during the pendency of his appeal in the state administrative process, filed this class action against the Ohio Bureau of Employment Services and Albert G. Giles, Administrator, on behalf of himself and all others similarly situated in the United States District Court, Northern District of Ohio, Eastern Division pursuant to 42 U.S.C. Section 1983 seeking declaratory and injunctive relief on the grounds that Ohio Revised Code, Section 4141.29(D)(1)(a) was unconstitutional on its face and as applied, violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 303(A)(1), (3) of the Social Security Act of 1935, as amended, 42 U.S.C. Section 503(a) (1), (3).

Plaintiff-appellee did not name as defendant his employer, United States Steel Corporation, Ohio Works, Youngstown, Ohio nor did he name as defendants the other United States

Steel Corporation facilities or Republic Steel Corporation, employers of the class which plaintiff-appellee alleged to represent, and whose financial interests would be substantially affected by any decision in this case.

Ohio Revised Code, Section 4141.28(0) mandates that all interested parties be named appellees in any state proceeding in order for each party to protect their respective interests. United States Steel Corporation and Republic Steel Corporation both have a substantial financial interest in the instant case because it is their respective accounts that will be affected as a result of a final decision in this case.

This case proceeded as a class action and upon motion by Plaintiffs-appellees, the United States District Court convened a three judge panel to determine the constitutionality of Section 4141.29(D)(1)(a), Ohio Revised Code.

Defendant's-appellants' opposition consisted of the following:

(1) The case is not a proper case for a three judge district court in an action for an injunction for money damages.
(2) Plaintiffs-appellees failed to exhaust their remedy at law.
(3) Plaintiff Hodory and his co-workers had a pending appeal before the Board of Review, Ohio Bureau of Employment Services.
(4) Plaintiffs-appellees failed to meet the requirements of Federal Rules of Civil Procedure, Rule 23(b)(3)
(5) The unemployment compensation laws in Ohio are solely the state's concern and have not been preempted by the Federal Government.
(6) The U.S. District Court should abstain from hearing the case on the basis of (a) comity and (b) Plaintiff-appellee was already in litigation on the issues of entitlement to benefits before the Board.

Briefs were submitted and oral arguments were heard by the three judge panel on the above issues. No evidentiary hearing was held to submit evidence on the merits or evidence presented to show the impact on the unemployment fund and employer's accounts nor the special interests of the defendants. Neither U.S. Steel Corporation or Republic Steel Corporation, the employers, were parties to this action.

The three judge court issued its Memorandum Opinion and Order on March 5, 1976 (Appendix p. 1) wherein the court held:

(1) Abstention would not be proper in this case. (Appendix p. 4)
(2) The prerequisites to certification of a class action under 23(a) have been met. (Appendix p. 7)
(3) Defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. (Appendix p. 10)
(4) Section 4141.29(D)(1)(a) as applied violated plaintiff's rights under the Equal Protection Clause of the 14th Amendment and the rights guaranteed by 42 U.S.C. Section 1983. (Appendix p. 11)

Final judgment was entered May 5, 1976 (Appendix 13). Defendants' Motion for a Stay Order, pending this appeal was granted on April 6, 1976 (Appendix 14).

SUMMARY OF ARGUMENT

It is the position of the Appellant that Ohio's labor dispute disqualification was enacted pursuant to the police power of the state and that it is supported by reasonable and rational policy considerations. These considerations include the desire of the state to preserve the fiscal integrity of its program by limiting unemployment insurance coverage to a manageable pool of risks, and the desire of the state to maintain a position of neutrality in labor matters. A necessary corollary to these arguments is the proposition that the State of Ohio has an interest and a right to keep its unemployment insurance program from mushrooming into a costly general welfare or income maintenance system. The Appellant further feels that the classifications created under the Ohio law here in issue are not arbitrary or invidious, but necessary if the State of Ohio is to maintain its system without recourse to emergency federal funding from the General Revenue Fund. In this context the Appellant feels that the court below erred in imposing an impermissibly heavy burden upon the State of Ohio in order to uphold the validity of its programs.

The Appellant further contends that the federal-state cooperative nature of Ohio's Unemployment Insurance system is not in conflict with the Social Security Act and creates no federal substantive right to unemployment compensation benefits. Any rights arising thereunder are state created rights and are not appropriate subject matter for consideration by a three judge district court in a 42 U.S.C. 1983 action.

Appellant further asserts that the decision of the three judge district court, predicated as it was on the belief that an unemployment insurance system could only be based upon fault, was in error.

Appellant contends that the decision of the three judge district court went beyond the scope of judicial review and entered the realm of judicial lawmaking and in so doing

deprived U.S. Steel and Republic Steel of their due process rights by imposing a crushing financial burden on their unemployment accounts and by causing them to face higher tax assessments in the future.

Appellant concludes by showing that the Ohio approach to the labor dispute disqualification is in accord with a line of case authority from both state courts and this court extending from the mid 1930's to the present.

ARGUMENT

A. The Classifications Resulting from Ohio's "Labor Dispute" Disqualification as in Effect at the time of this Labor Dispute are Supported by Reasonable and Substantial Bases and Further a Suitable Governmental Interest.

Unemployment insurance, one of the aspects of the Social Security Program, is a co-ordinated federal-state effort designed to provide economic security for those workers who have a sufficient attachment to the labor market to establish an employer-employee relationship and who become unemployed under various conditions, generally because of loss of work due to severe economic conditions. In general, the program is financed out of taxes, or "contributions", as they are commonly referred to in state unemployment laws, imposed upon employers under State law and the Unemployment Tax Act, 42 U.S.C. Section 3301 *et seq.* and various State statutes. Most states, between 1935 and 1939, enacted unemployment statutes in order to participate in the Federal Administrative Fund pursuant to 42 U.S.C. Section 503. Employers were allowed credit on their federal taxes, 42 U.S.C. Sections 3302 and 3303, if the State in which they were subject to taxes had an approved State unemployment plan. "Unemployment Funds" are special funds, established under a State Law and administered by a State Agency, for the payment of compensation. 26 U.S.C. Section 3306(f). State funds deposited in the federal unemployment trust fund are a continuing appropriation for a specific purpose, and the federal government does not obtain

title to the monies but holds it in trust for the State Unemployment Agency. *Gillum* v. *Johnson*, 62 P. 2d 1037, 7 Cal. 2d 774; rehearing denied 63 P. 2d 810, 7 Cal. 2d 744.

The Unemployment Tax Act, 26 U.S.C. Section 3304 (a)(5) contains the only language that imposes a restriction on the States in denying benefits; two of the three involve labor relations:

> "(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing the accept new work under any of the following conditions:
>
> (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> (C) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;
>
> (6) all the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time."

It is clear that States have a wide range of differences in the unemployment area as is apparent from the "Comparison of State Unemployment Insurance Laws", U.S. Department of Labor (1972).

It is important at this juncture to point out that since the Social Security Act of 1935 became effective, the states have been unbridled by Federal control in two important areas of local concern—coverage and exemptions. In *Claim of Cassare-*

tahis, 44 N.E. 2d 391, 289 N.Y. 119 (1942) Motion denied 47 N.E. 2d 438, 289 N.Y. 838, affirmed 63 S. Ct. 1067, 319 U.S. 306 the court opined that Congress intended to leave the States the widest possible latitude in setting up unemployment compensation systems, both as to the kind and to the extent of coverage provided, notwithstanding the provisions of Section 1600, *et seq.* of the Internal Revenue Code of 1939 (Now contained in 26 U.S.C. Section 3302). See also: *A. J. Meyer & Co.* v. *Unemployment Compensation Commission*, 152 S.W. 2d 184, 348 Mo. 147 (1941) and *Buckstaff Bath House Co.* v. *McKinley*, 60 S. Ct. 279, 308 U.S. 358, 84 L. Ed. 322 (1939).

The Plaintiffs-appellees contend that Section 4141.29(D)-(1)(a), Ohio Revised Code creates two classes of unemployment claimants--one where the claimant receives benefits when he becomes unemployed through no fault of his own and second, where the claimant is denied benefits when he becomes unemployed through no fault of his own because the main plant where he works is forced to close because it cannot obtain coal as a result of a strike at the company owned, fully integrated, facility. This distinction, plaintiff-appellee claims, fails to meet the "rational basis" test for equal protection under the Fourteenth Amendment.

In the area of social welfare legislation, federal courts are, as a general rule, reluctant to infringe upon the states' prerogatives. *Weinberger* v. *Salfi*, U.S. , 95 S. Ct. 2457 (1975); *Geduldig* v. *Aiello*, 417 U.S. 484, 94 S. Ct. 2485, 417 L. Ed. 2d 256 (1974); *Jefferson* v. *Hackney*, 406 U.S. 525, 92 S. Ct. 1724 (1972). In *Dandridge* v. *Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), disclaiming any intention to impose a federal viewpoint in the field of social policy, the court stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause because the classification made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Supra*, at 485.

With *Dandridge, supra*, as a convenient starting place, a number of important principles emerge from the cases. First, a legislative body need not address a perceived social evil in its entirety but may approach the problem one step at a time. *Dandridge* v. *Williams, supra* at 486-487. See *Geduldig* v. *Aiello, supra; Romero* v. *Hodgson*, 319 F. Supp. 1201 (N.D. Cal. 1970) affirmed, 403 U.S. 901 (1970). Second, the federal court will not attempt to evaluate the fine policy considerations, practical problems and political compromises that enter into and shape legislative intent. *Weinberger* v. *Salfi, supra; Dandridge* v. *Williams, supra* at 485; *Von Stauffenberg* v. *District Unemployment Compensation Board*, 459 F. 2d 1128 (D.C. Cir. 1972), *Atchison* v. *Matthew*, 174 U.S. 106, 19 S. Ct. 609 (1899). Third, a statutory program will survive a constitutional attack if any state of facts can be adduced to provide a "rational basis" for the legislative judgment. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 57 S. Ct. 868 (1937); *In re Stalham*, 483 F. 2d 436 (1937), cert. denied 94 S. Ct. 578, 414 U.S. 1069 (1973).

The State of Ohio possesses a legitimate interest in assuring an adequate monetary reserve in its unemployment fund since its resources are limited by the tax rate on employers which is set by the state legislature. *Geduldig* v. *Aiello, supra.* Further, the reservoir is not unlimited; liberalization of benefits without a corresponding replenishment could rapidly run the reservoir dry. In fact, twenty-one states have already bankrupted their trust funds as of October 1976, but this will be treated later in more detail. Should this Court invalidate the statute under consideration in this case two consequences will result. First, if retroactive benefits are required to be paid, it would be an

encroachment upon the unemployment policies of the state by the federal courts, leading to the expenditure of state monies that it had not intended to expend and second, this would deny the General Assembly of Ohio the right to engineer and design their own social program as contemplated by the Federal government, which has resisted attack by various interest groups in the courts for the past 40 years and prohibited by the holdings in this court in *Dandridge, supra.* This would be not only repugnant to the Tenth Amendment of the United States Constitution and to the entire concept of the unemployment compensation program, but would be an encroachment into future recipients' rights to benefits under legitimate earned benefit payments by depleting the fund.

Plaintiffs-appellees next contend that the apex of the Federal Unemployment Laws is to provide benefits to workers who have become unemployed through *no fault* of their own, therefore, the Ohio statute 4141.29(D)(1)(a) is constitutionally defective and in violation of the Supremacy Clause, U.S. Constitution, Article VI, Cl. 2 and the Due Process and Equal Protection Clause, U.S. Constitution, 14th Amendment. Appellants presented the following arguments to the District Court.

(1) Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect by subsidizing the union members.

(2) Granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions.

(3) The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund.

(Answer Brief of Defendants, p. 12)

The three judge court held that

"Defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits."
(Appendix p.10)

Defendants-appellants contend that nearly all states have a labor dispute disqualification in one form or another. Some States deny benefits absolutely to strikers, some States deny benefits until a certain number of weeks have expired, and others have similar statutes to Ohio's that deny benefits not only to those actually out on strike but to those who are laid off because a strike exists at a functionally integrated facility which causes the entire plant to shut down—either from lack of parts, supplies in the form of raw materials or fuel as in the instant case. North Carolina's statute, which is identical to Ohio's was upheld by this court in *Abernathy* v. *Eastern Airlines,* 259 N.C. 190, 130 S.E. 2d 292 (1963) cert. denied, U.S. Sup. Ct. 375 U.S. 161 (1963). This court decided a similar but not identical labor dispute case in 1963 wherein the reasonableness of a labor dispute disqualification was upheld when benefits were denied to many Alaskan fishermen who became unemployed through no fault of their own due to a labor dispute in San Francisco which delayed the fishing boats to such an extent that it was too late into the season to send the fleet out from Alaska. *Unemployment Compensation Commission of Territory of Alaska* v. *Aragan,* 392 U.S. 143, 67 S. Ct. 245 (1946) rehearing denied 329 U.S. 834, 67 S. Ct. 627 (1947).

Ohio law treats all labor disputes equally. No distinction is made between an entire plant that is forced to close down due to a strike in one of the departments of the company or where one of its separate facilities is on strike causing the entire plant to shut down. In either case, benefits would be denied. In reality, there is little practical difference between the two situations. When a department, for example, consisting of workers in the plumbers and steamfitters union engage in a labor dispute and go out on strike which in turn forces the employer to close the plant, it is entirely possible that the other

unions in the plant such as the electrical workers, sheetmetal workers, carpenters, assembly workers, etc., may not be in sympathy nor even benefitting or participating in the strike—yet they are denied benefits. It even may be that not all the members of the union on strike wish to be unemployed, yet they are ineligible for benefits. The second argument presented by the defendant/appellants below was that granting of benefits to workers unemployed due to a labor dispute would place the employer in an unfair negotiating posture. The economic advantage would go to the union who could limit and preserve its strike funds whereas the employer would be faced with settling at any cost or face the burden of increased tax rates in addition to the loss of income for the duration of the strike while his fixed overhead, taxes and expenses continue to accrue. The increased tax rate could go on for many years, long after the strike has been forgotten by the union and the workers.

The third argument, which is of primary concern to the State of Ohio and the Ohio Bureau of Employment Services, charged by statute to administer the unemployment compensation program is the preservation of the state fund. This court held in *Geduldig* v. *Aiello*, 417 U.S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1947) that the preservation of the state fund and the interest in distributing available resources in such a way as to not unduly burden the contributors was a legitimate interest "so long as the line drawn by the State is rationally supportable" and the "courts will not impose their judgment as to appropriate stopping point for state social welfare programs".

Equally important to the instant case is the rationale contained in *Dandridge* v. *Williams*, 397 U.S. 471, 486-487, 90 S. Ct. 1153, 1162, 25 L. Ed. 491 which was cited by the Honorable Justice Stewart and contained in the Syllabus, paragraph 2 of the *Geduldig* case, *supra*.

> "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all".

Appellant's Answer Brief, p. 11 cited cases wherein this rationale was upheld by various courts from the year 1898 to the present time. A state's interest in preserving the fiscal integrity of its fund by restricting the eligibility of a class is within the power of the legislature provided it does not conflict with some federal standard. (See also transcript, p. 11).

The State of Ohio, the Ohio Bureau of Employment Services and the employers are not the only parties interested in preserving the fiscal integrity of the fund and concerned with the increasing economic burden being placed on employers by increasing the tax rates in order to maintain the unemployment insurance program.

In the Hearing before The Committee on Finance, United States Senate, Ninety-fourth Congress, first session on H.R. 6900, June 10, 1975 (U.S. Government Printing Office No. 53-821-0, 1975) the tables and statistical material on page 119 entitled "Unemployment Benefits Paid—or Projected To Be Paid" (Current Law) based upon June 1, 1975 unemployment assumptions shows that in 1973 $4.2 billion was paid out in benefits. In 1975 this figure rose to $18.3 billion, an increase of approximately $14 billion dollars. Table 10—Advances to States from the Federal Unemployment Account, page 118 shows that from 1972 through May 15, 1975 eight states had to borrow from the federal unemployment account in the amount of 608.4 million dollars because their state compensation funds were exhausted. The Department of Labor statistics as of October 15, 1976 show that thirteen additional states have had to borrow from the federal loan fund. (U.S. Senate Finance Committee—Staff Report on Unemployment Insurance Amounts of 1976, dated August 15, 1976 and U.I. Trust Fund Summary Quarterly Report—Published by Bureau of Accounts, U.S. Treasury, Division of Government Finance Operations, Report No. BA-R-1114). Twenty-one states have borrowed $3,208,032,294 from the federal compensation fund,

which in turn, due to the federal loan fund becoming insolvent, had to turn to the federal general revenue fund (Taxpayers' monies) for advances in the amount of $2.9 billion. As a result of the heavy drain on unemployment funds, the Federal Unemployment Account as of October 15, 1976 had only $321.4 million in reserve—only $83,513,168 over the amount Ohio has in its own trust account. The breakdown of loans to the states are as follows:

Alabama	$ 30,000,000
Arkansas	20,000,000
Connecticut	355,145,380
Delaware	14,500,000
District of Col.	29,600,000
Hawaii	22,500,000
Illinois	429,400,500
Maine	14,900,000
Maryland	36,159,000
Massachusetts	265,000,000
Michigan	571,000,000
Minnesota	123,000,000
Montana	1,366,089
Nevada	7,600,000
New Jersey	497,202,000
Oregon	18,450,000
Pennsylvania	464,734,825
Puerto Rico	57,000,000
Rhode Island	65,500,000
Vermont	35,272,000
Washington	149,400,000
Total	$3,208,032,294

Ohio's fund, although still financially in the black, had a balance of $237,886,832 as of September 30, 1976. The Fund has dropped from a high of $775,199,878 on December 31, 1974. From December 31, 1971 until December 31, 1974, Ohio

maintained a reserve balance of over $600 million per year to meet the needs of unemployed workers who were entitled to benefits under our state laws. Today, Ohio is faced with the possibility of a financial crisis, perhaps joining the ranks of the other twenty-one sister states who had to borrow from the federal government to maintain its unemployment program if economic conditions remain poor.

States that borrow from the federal compensation fund are required to repay those amounts within two years. If not repaid, the employers' tax rate of 3.8% is increased in 0.3% increments per year as a penalty. For instance in 1976 it would be 0.3%, 1977 the rate would be 0.6%, in 1978 the rate would be 0.9% and so forth. This is in addition to the 0.5 percent which goes into the states mutualized account.

The concern for this additional burden placed upon the employer is evidenced by the following discussions that occurred on June 10, 1975 in the Hearing-Committee on Finance, United States Senate, Ninety-Fourth Congress, First Session on H.R. 6900, U.S. Government Printing Office, Washington, D.C. No. 53-821-0 (1975). Chairman of the Committee on Finance, Russel B. Long:

> "Mr. Secretary, eight states have exhausted their unemployment benefit accounts and are now borrowing money from the Federal Unemployment account to meet their benefit obligations. These are interest free loans, but if they are not repaid within 2 years, the Federal unemployment tax on employers in the State, in effect, is automatically increased in order to increase the amount. Senator Ribicoff's bill, S. 1502, now pending before the committee, would allow an additional 3 years for these loans to be repaid. Could you give us your view on this proposal?"
>
> Secretary Dunlop:
>
> "Well Senator, you are perfectly right of the fact of these States and others that will in the future exhaust their funds

and be required to borrow. We, I think, are concerned about the impact of these tax penalties on employers in the States where economic conditions are already causing heavy burdens".

Hearing—Committee on Finance—United States Senate, Ninety-Fourth Congress, First Session on H.R. 6900, page 56.

Plaintiffs-appellees contend that the Federal Government has preempted the field on Unemployment Compensation reducing the States' participation to that of a mere ministerial function.

Senator Floyd K. Haskell asked the following question to Secretary Dunlop:

"What role does your office or your agency play in determining whether or not a Federal Fund is actuarily sound; whether in fact the law is collecting adequate money to fund potential unemployment benefits?"

Secretary Dunlop deferred to Mr. Lawrence E. Weatherford, Jr., Associate Manpower Administrator in the Department of Labor because the question was in his area of responsibility. Mr. Weatherford responded:

"Senator, there are really two areas that we have. The first one is one where the State has the full responsibility, and there is no strict Federal requirements that would impose on the State a tax rate, the amounts, and the solvency of that fund.

The second area is one that we do actively participate in. It is one where we provide technical assistance to our actuaries to each State in developing appropriate tax schedules and estimating income, outgo, and trying to provide that technical assistance that a State needs. *We have got to provide a great amount of influence over it by program letters, leadership, guidance, to make sure that the State does develop a program that is sound.* In this regard we have a lot of work to do . . . *because over half of our states' trust funds are going to be in serious difficulty*".

Hearing—Committee on Finance, U.S. Senate, Ninety-Fourth Congress, First Session on H.R. 6900, June 10, 1975, page 42.

During the Hearings before the Committee on Finance, United States Senate, Ninety-Fourth Congress, First Session on H.R. 6900, June 10, 1975, testimony of the various members of Congress and committee members themselves clearly indicate that the federal government is gravely concerned over (1) the solvency of the fund, (2) the continued extended funding will develop into an income maintenance system, (3) the danger of too much funding by the federal government in extended benefits after claimants exhaust their state benefits will lead to a gradual take-over of the unemployment programs by the Federal Government; (4) the increasing burden that is being placed upon the taxpayer who ultimately has to bear the burden of the costs and (5) the Federal Government determining who is to be covered and what amount of benefits will be paid. The following testimony is offered in support of the above statements:

Senator Robert Dole, Kansas, member of the Committee on Finance, speaking in support of H.R. 6900 stated:

"I might preface my remarks by stating that I voted for the Amendment on the Tax Reduction Bill to provide an additional 13 weeks' benefits through the end of this month. I did so with reservations, however, in that I am concerned over the possibility that this may become more than an "interim" action.

I say that because our record of turning supposedly temporary programs into permanently established policy is not very encouraging . . . Certainly, these times of excessive unemployment call for responsible relief measures by Congress. But at the same time, we need to *guard against*

the possible evolution of a protracted income maintenance system—which could conceivably end up being subsidized itself out of general revenues". (emphasis added). Hearings, *supra* pp. 1, 2.

That statement by Senator Dole on June 10, 1975 was at a time when the Federal Loan fund contained 3.8 billion dollars. On October 15, 1976 the Federal Loan Fund, after borrowing 2.9 billion dollars from the taxpayers out of general revenue funds, to help states with depleted trust funds, had a balance of 321.4 million dollars.

The purpose of the unemployment insurance program is to pay benefits to those workers who have lost their jobs, due to economic conditions, and to help finance them while they are actively seeking new employment in the open job market. *Actively seeking employment* is a *condition* in nearly all the states as a condition precedent to receiving benefits. Senator Russell B. Long, Chairman of the Committee on Finance succinctly stated the purpose of unemployment programs.

"Mr. Secretary, the *theory of unemployment benefits is that they provide income on a temporary basis to the worker who has become involuntarily unemployed; and he can then find a suitable job.* He is *allowed 26* weeks to *find a new job* under the regular unemployment program; 39 weeks when unemployment is high; either nationally or in his state . . . At what point do you feel we should cease to consider a man's unemployment a purely transitional problem and do something to create jobs, rather than just provide cash income to people who are not working?" (emphasis added)

The Honorable John T. Dunlop, Secretary of Labor replied:

"Mr. Chairman, I think that is a good question, and that is the range of issues I referred to a little while ago by

suggesting that at some point the UI system runs the danger of doing what the British did in the 1930's, of turning it into a sort of welfare system" . . . I do think that it is appropriate that the duration should rise in times of very heavy unemployment. And the reason for that principle, I think is this. The job search which takes place in a labor market may take a lot longer, and one may have to travel a lot further in times in which unemployment levels are appreciably higher . . . I, myself, am concerned and at the outset this morning, Mr. Byrd, expressed *concern about our system degenerating—instead of a Federal-State system,* instead of an employer tax supported system—*degenerating into* what I call a *public assistance program.* And I used the experience of the British in the 1930's because that is the classic case in which it went awry. And I am concerned about that."
Hearings before the Committee on Finance, United States Senate, Ninety-Fourth Congress, First Session on H.R. 6900, June 10, 1975 at pages 34 and 38.

In response to Senator Harry F. Byrd, Jr.'s question:

"Is the system policed adequately to determine that those who have not been placed in jobs at the end of, say 52 weeks have *really sought jobs*?" Hearings, *supra,* at 39.

Secretary Dunlop stated:

". . . First, I will confess that it is extremely difficult, conscientiously, perhaps, to administer that in a time in which jobs are very scarce, because the ultimate test of availability is sending a person out to a job to see whether he will accept it or not and for what reasons. And this is the best test. . . . *Now, each of the states,* as you know, *has its own rules about this matter,* and *what is an appropriate availability for work concept in one state is not applied in another; they have their own.* What wage will a man or woman have to accept? How far will they have to travel?

Shall they or shall they not work on the night shift in order to accept a job? How far different from the kind of work that they have normally done shall they be allowed to refuse and still draw unemployment compensation? These are very difficult problems, I confess, and as I say, an enormous body of precedent and law and court decisions, as a matter of fact, in all of these States, has grown up over that matter."

Hearings, *supra*, page 39, 40.

Senator Floyd K. Haskell, committee member asked this question to Secretary Dunlop of the Labor Department:

"Mr. Secretary, the bill on which we are holding this hearing would extend unemployment benefits from 40 to 65 weeks, and this means, I assume, additional employer taxes. *I wonder at what point is the employer going to stop being burdened and at what time, will this be a general fund responsibility*? (emphasis added).
Hearings, *supra*, p. 40

Secretary of Labor Dunlop responded as follows:

". . . Although we have not come down on any position about the issue you raised, the advisory council, the Federal Unemployment Insurance Advisory Council, has come down on this side of saying after 39 weeks the matter ought to become a Federal Government responsibility. (General Revenue funds).

On the other hand, I have some *reservations* about too early in the duration *transferring the responsibility to the Federal Government exclusively*, partly because that *further undermines* the *state-federal system, which I think*, in this area, speaking personally, *I would like to see preserved.* If the Federal Government pays a larger and larger share of that bill, it seems to me the case for the *federalization* of the *system*, which has become a very emotional issue in

many parts of the country and among many of the *employers* in the country, becomes a little easier; *and the arguments for Federal determination, not only of benefit standards* but of *duration*, and *each* and *all* the *gory details*, including the administration of these matters I was talking with Senator Byrd about, become much more possible and much more difficult to resist. I do not, myself, think that, on the whole, is a desirable development. So, I am not, myself, too enthusiastic about that, apart from its fiscal and obvious budgetary factors." (emphasis added)

Hearing—Committee on Finance, pages 40, 41.

The Payment of Unemployment Insurance Benefits To Those Unemployed Due To A Labor Dispute Would Constitute An Unlawful Entry Into An Area Preempted By The Federal Government.

Although the chief concern of the Ohio Legislature was to maintain an equilibrium between insured risks of unemployment on the one hand and the necessary level of contributions from employers on the other hand, thus protecting the fund, there has been for 40 years, in addition to the other arguments above, the further justification of "state neutrality" in labor disputes. It has long been the policy of the State of Ohio to remain neutral in labor disputes. It might well be feared that the state's ability to impose conditions upon claimants seeking unemployment benefits such as "actively seeking work" and "able and available for work" would exercise an influence upon the conduct of members of organized labor. (Sec. 4141.29 Ohio Revised Code, Appendix p. 26). It has been further feared that the payment of unemployment insurance benefits to those unemployed due to a labor dispute would have an adverse effect upon an employer's bargaining posture by forcing the employer to subsidize a strike against himself or by giving strikers the psychological reinforcement of knowing that their co-workers in sister unions of the same employer will not

suffer. This latter consideration is supported on further policy grounds when one considers the possibility and probability of collusion between unions co-existing at the same functionally integrated establishment.

In the case of *Hawaiian Telephone Co.* v. *State of Hawaii Department of Labor and Industrial Relations*, Civil No. 74-140 (1975), the United States District Court, District of Hawaii held that the payment of unemployment insurance benefits to strikers by the state constituted a wrongful entry into the field of labor relations preempted by the National Labor Relations Act. The Hawaii Federal District Court continued to state that it was axiomatic that state laws may not interfere with employee activities protected or prohibited by Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. Sections 157-58 and that under the Supremacy Clause state laws that conflict with federal legislation are invalid. (See *Garner* v. *Teamsters Local No. 776*, 346 U.S. 485, 490-91 (1953)); *San Diego Building Trades* v. *Garmon*, 359 U.S. 236 (1959), *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). The U.S. District Court of Hawaii then struck down the Hawaiian practice of paying benefits to strikers. Certainly if the policy of "state neutrality" is strong enough to warrant the negation of a state policy, it ought to be at least sufficient to provide a rational nexus or reasonable basis for supporting a state law.

B. The Ohio System of Unemployment Compensation is not in Conflict with the Federal Social Security Act.

The three judge district court below in its memorandum opinion (pages 1, 8 Appendix) found a relationship to exist between the Federal Social Security laws and the Unemployment Insurance Laws of the State of Ohio and presumed the existence of a federal right to unemployment compensation protected by 42 U.S.C. 1983 and the 14th Amendment. The court below erred because the Ohio labor dispute disqualification does not contravene any Federal substantive right found in the Federal Social Security laws.

The Plaintiff below, appellee here, successfully argued that *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 91 S. Ct. 1347 (1971), a case interpreting 42 U.S.C. 303 and 503, created a substantive right to unemployment when employees are "unemployed through no fault of their own" and they further argued that this constituted the basis of a 42 U.S.C. 1983 action. Contrary to the position argued by the plaintiff below, and accepted by the Three Judge District Court, the Social Security Act 42 U.S.C. 303 and 501, 503 creates no such substantive federal right. Rather 42 U.S.C. 303 and 501, 503 give rise to *procedural* rights, none of which are in issue in the instant case, while the substantive aspects are wholly state law.

All federal-state cooperative unemployment insurance programs are financed in part by grants from the United States pursuant to the Social Security Act, 42 U.S.C. 501-503. No grant may be made to a State for a fiscal year unless the Secretary of Labor certifies the amount to be paid, 42 U.S.C. Section 502(a). The Secretary of Labor may not certify payment of Federal funds unless he first finds that the State's program conforms to federal requirements. In particular, Section 303(a)(1) of the Social Security Act requires that *state* methods of administration be found "to be reasonably calculated to insure full payment of unemployment compensation when due." Neither 42 U.S.C. 303, 42 U.S.C. 503, nor any case law thereunder mandate any substantive eligibility or disqualification requirements; rather, they address only the procedural aspects of administering a joint federal state program based on *state* substantive law.

The provisions which the states must include in their laws to obtain funds for administration are contained in Sec. 303(a) of the Social Security Act. They are as follows:

(1) The law must provide for methods of administration which are found by the Secretary to be reasonably calculated to insure full payment of unemployment

compensation when due. This provision also requires that the state agencies establish and maintain a personnel system based on merit, but prohibits the Secretary of Labor from exercising any authority with respect to the selection tenure of office, and compensation of any individual employed by a state agency.

(2) Unemployment benefits must be paid solely through public employment offices or such other agencies as the Secretary may approve.

(3) Individuals whose claims for unemployment compensation have been denied must be given the opportunity for a fair hearing before an impartial tribunal.

(4) All money received in the state fund, immediately upon its receipt, must be deposited with the Secretary of the Treasury to the credit of the federal unemployment trust fund. This provision does not apply to refunds of sums erroneously paid into the state fund or refunds paid in accordance with IRC Section 3305(b).

(5) All funds withdrawn from the federal unemployment trust fund must be used by the state for the payment of unemployment compensation benefits, exclusive of expenses for administration, and for refunds of sums erroneously paid into the state fund or refunds paid in accordance with IRC Sec. 3305(b). This provision stipulates, however, that contributions by employees may be used to pay disability benefits. In addition, there is an exception where a state, pursuant to a specific appropriation made by the legislature, withdraws money for the payment of expenses incurred by it for the administration of its unemployment compensation law and public employment offices, as provided for in Sec. 903(c)(2) of the Social Security Act.

(6) The state is required to make such reports in the form and containing the information required by the Secretary of Labor, and the states must comply with the provisions the Secretary finds necessary to assure the correctness and verification of such reports.

(7) The state must make available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, including a statement of the recipient's rights to further compensation under the law.

(8) All funds received pursuant to Sec. 302 of the Social Security Act for the proper and efficient administration of the state's unemployment compensation law must be used solely for that purpose.

(9) Any funds received pursuant to Sec. 302 of the Social Security Act which, because of any action or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary for the proper administration of the state law must be replaced within a reasonable time.

In *Ruth Fenoff* v. *State of Vermont, Department of Employment Security and Mrs. Madelyn Davison, Commissioner*, 1974 1A CCH Unemployment Insurance 3999-140 (paragraphs 21, 437) hereinafter cited as *Fenoff* and in *Ocie Nevills* v. *State of Illinois*, 388 F. Supp. 62 (D.C. Ill. 1974), hereinafter cited as *Nevills*, the district courts of two different states both agreed that 42 U.S.C. 303, 501-503 addressed only procedural and *not* substantive federally secured rights. In *Fenoff, supra*, a three judge district court ruled that the state unemployment insurance laws of Vermont which provided a blanket disqualification

from receiving unemployment compensation benefits during the first week of unemployment was not in conflict with 42 U.S.C. 503 as that statute was interpreted in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 91 S. Ct. 1347 (1971). The three judge district court in *Fenoff* said that the "payment when due" language was applicable only in determining when such benefits as a *state* may decide to pay must be paid and that this provision was not applicable in determining the substantive laws surrounding unemployment compensation benefits disqualifications. In *Ocie Nevills* v. *State of Illinois, supra*, the U.S. District Court for the Eastern District of Illinois addressed a factual situation similar to that in *Fenoff, supra*. In *Nevills*, the court dismissed the Plaintiff's action stating that although the state's unemployment compensation program was a joint federal-state cooperative effort financed in part by grants from the federal government pursuant to the Social Security Act 42 U.S.C. 501, the federal law left the states free to adopt their own eligibility requirements and disqualification provisions.

These cases are in accord with a line of authority developed by this court in 1937. Up until the time that this Court decided the case of *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495, 57 S. Ct. 868 (1937), hereinafter cited as *Carmichael*, the right of the state to impose any system of disqualification was unchallenged. In *Carmichael, supra*, the Unemployment Insurance Laws of the state of Alabama were challenged on the ground that the various classifications imposed therein infringed the due process and equal protection clauses of the Fourteenth Amendment, and were further challenged on the ground that they were an unconstitutional surrender to the national government of the sovereign power of the state. This court held those challenges to be unfounded and invalid. At 301 U.S. 495, 519 this court upheld the right of the state of Alabama to adopt its own system of disqualifications from receiving unemployment compensation benefits saying: "In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt (citations omitted), or where it is most practicable to deal with it (citations omitted). It may exclude others whose need is less (citations omitted), or whose effective aid is attended by inconvenience which is greater (citations omitted)."

It is significant to note that the Alabama Unemployment Insurance Law, challenged as unconstitutional in *Carmichael, supra*, contained a "Labor dispute disqualification" which was subsequently used to disqualify claimants under facts not unlike those in the instant case (See Alabama Board of Appeals Decisions Nos. 2230-2242, March 4, 1950).

At page 526 of the *Carmichael* case, *supra*, this court addressed the relationship between the State Unemployment Compensation Laws and the Federal Social Security Act and concluded that there was no conflict. This court stated that:

> "... The unemployment compensation fund is administered in accordance with state law by the state commission. The statute may be repealed at the will of the legislature, and in that case will be free to withdraw at any time its unexpended share of the Unemployment Trust Fund from the treasury of the United States, and to use it for any public purpose" ...

Similarly in *Chas. C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937), hereinafter cited as *Steward*, this court in an opinion by Mr. Justice Cardozo reaffirmed the position taken in *Carmichael* that Unemployment Compensation is wholly a matter of State law. At page 301 U.S. 548, 594 and 596 of *Steward, supra*, this court stated that the only federal aspect of state unemployment dealt with the allowance of a tax credit, and that the utilization of this federal credit created no more a federal interest in the state program than would the deposit of state monies in a national bank.

Although the federal government could attempt to create federal rights to receive unemployment compensation benefits on facts like those in the instant case, it has chosen not to do so. As early as 1935 President Roosevelt professed that so long as state systems of unemployment compensation conformed to the conditions precedent to receiving federal funding or tax credits, the administration of the unemployment insurance funds and the determination of eligibility of claimants should be left in the hands of state executive and judicial instrumentalities (H.R. Doc. No. 81, 74th Cong., 1st Session VI (1935)). As recently as 1969 the United States Congress has rejected proposals that would have enabled the Federal Government to dictate disqualification provisions. Chairman Mills stated that this was an area left to the states and that they should be "given the latitude to enable them to write the type of program that they want" (115 Cong. Rec. 34106, 1969). The Preface to the "Comparison of State Unemployment Insurance Laws" U.S. Department of Labor (1972), V.C. Hodgson, Secretary, begins by saying at page iii:

> "In the Federal-State system of unemployment insurance established in this country under the Social Security Act, the individual states have been free to develop the particular program that seems best adapted to conditions prevailing within the state. Consequently, no two State laws are alike".

It is the position of this Appellant that the State of Ohio in enacting and enforcing Section 4141.29(D)(1)(a) Revised Code as in effect in 1974 acted pursuant to its rights as a sovereign state as guaranteed by the Tenth Amendment of the U.S. Constitution. It is this Appellant's further belief that in enacting this statute the State of Ohio could not have violated any provision of 42 U.S.C. 303, 501-503 because this federal act creates no federal substantive right. It is further contended that in the absence of such federal right no 42 U.S.C. 1983 action can be maintained, and the court below erred in finding for the

Plaintiff below. *Ortega* v. *Ragen*, 216 F. 2d 561 (CA 7, 1954), *Street* v. *Surdyka*, 492 F. 2d 368 (CA 4, 1974), *Saffiote* v. *Catherwood*, 305 F. Supp. 989, affirmed 417 F. 2d 971 (CA 2) (1969). It has long been recognized that state systems of unemployment compensation create no federal substantive right in spite of the nature of the joint federal-state program. In *Eldred* v. *Division of Employment and Security, Department of Social Security*, 295 N.W. 412 (1940) the Supreme Court of Minnesota in disposing of a constitutional challenge to various classifications of that law's coverage stated at page 414:

> ". . . Upon what basis, then, can it be said that plaintiff, under the circumstances here disclosed, has any right to question, upon a constitutional basis the classification made by the amendment? *He is possessed of no vested rights* adversely affected by the amendment, since what the legislature has given it can take away, at least as to all benefits not already accrued when the amendment became effective. In any event, the burden is on plaintiff to show that the act has adversely affected *some substantial rights belonging to him which is protected by the constitution.* Unless he does so he is not in position to challenge its validity" . . . (emphasis added).

In the instant case an examination of the claim of the plaintiff below, Appellee here will reveal that he has established no federal right to unemployment insurance coverage and is merely displeased with what he perceives to be the underinclusiveness of the Ohio law. An alleged violation of rights which stem solely from a relationship of a citizen to his state or a right derived solely from state law is not protected by the Federal Constitution or the federal statutes. *Gentry* v. *Howard*, 288 F. Supp. 495 (N.D. Tenn., 1968).

C. A State System of Unemployment Compensation May Predicate Disqualification from Receiving Benefits Upon Any Reasonable Basis.

The plaintiff and the three judge district court both erroneously contended that the disqualification from receiving unemployment insurance benefits can be predicated only upon "fault". (See Memorandum Opinion and Order, Appendix p. 10).

As previously stated, Unemployment Compensation although social legislation, is less like a "welfare program" and more like an "insurance policy" under which benefits are paid when a risk that has been insured against comes to fruition. In *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495 (1937) this court examined both the extent of coverage and nature of disqualifying factors involved in Alabama's Unemployment Insurance program. At page 518, 519, 520, this court recognized that a state system of unemployment insurance need not reward the needy and ignore the guilty but rather a state could predicate disqualification on any reasonable basis. This discretion is necessary because economic and employment conditions vary from jurisdiction to jurisdiction and according to geography.

In *Matter of Heitzenrater*, 19 N.Y. 2d 1 (1966) at page 7 Judge Fuld in discussing whether a labor dispute disqualification should be based on "fault" said that "fault" is not a "meaningful concept" when applied to the labor dispute disqualification because it tends to vest in the officials of an unemployment system, the power to decide questions of labor relations better left to Federal and State arbitrators. To say that "fault" is the sole disqualifying factor would require that whole sections of the Ohio law be ignored. Under the Ohio system of unemployment insurance entire industries are not afforded coverage such as school teachers out of work over lengthy school vacations, commissioned salesmen, independent contractors, and agricultural workers.

In terms of actual disqualifying factors, the State of Ohio under 4141.29 (Appendix p. 26) has chosen to "disqualify" from receiving unemployment benefits a number of classes that are not fault related. Among these classes are those persons who are not "actively seeking" work and those individuals who are not "available" for work. Under these provisions full time students have been disqualified as well as hospitalized workers who are not "available" for work; yet, none of these classes involve "fault" as that term is commonly defined.

There is, in the Ohio Unemployment Insurance program, much overlap between classes of disqualified workers. Some workers fall under more than one disqualification. In the instant case the labor dispute disqualification was utilized; however, in the absence of this states might utilize other disqualifications such as "availability for work" or "actively seeking work". As mentioned elsewhere in this brief, the Unemployment Insurance system requires "unemployment". Although there are exceptions, unemployment contemplates a situation in which an employee is severed from his employment and thus is free to "actively seek" work elsewhere and make himself "available" for such work. A strike and unemployment due to a labor dispute are outside the scope of this contemplation because the workers involved have not really severed their employment contracts. They might not have time to look for work or might be contractually prohibited from using the skills that they learned from their last employer, in the service of a new employer, and thus would be disqualified for "refusing suitable work". Clearly, there is no blackletter formula for disqualification, rather, there are conditions and circumstances which the State legislature has elected not to compensate or has elected to categorize under one broad topic instead of under several unwieldy ones.

There is one more important concern to the State of Ohio and the Bureau regarding the potential liability on its trust funds. There is now pending before the Court of Appeals,

Eleventh Appellate District, Trumbull County, Warren, Ohio *Achey* v. *General Motors Corp., et al.*, Case No. 2355, which has been stayed pending the decision of this court in the instant action. This case involves thousands of employees who were laid off by General Motors in Lordstown, Ohio under the same disqualifying statute and circumstances as in this case. (transcript p. 52). Counsel for plaintiff-appellee have another class action suit against the Ohio Bureau in the United States District Court for the Northern District of Ohio, Eastern Division, Youngstown, Ohio in Civil Action No. 76-139Y.

In addition, plaintiff-appellees' counsel indicated that by "discovery and further evidentiary hearings establish other class members" who have been denied benefits in previous years as a result of the same disqualification as being litigated herein. (transcript p. 52, line 16, 17, and 18). Opposing counsel attempted to have the District Court hold the matter for determination in order to determine the identity of other classes affected in the past by the application of Section 4141.29(D)(1)(a), Ohio Revised Code (transcript p. 53, line 24 and 25, p. 54, line 1). The judges held a conference and did not reply to opposing counsel's request. (transcript, p. 54, line 2 and 3).

The Bureau is greatly concerned that an adverse ruling in this case would have a domino effect completely devastating the trust fund.

D. The Decision of the Court Below Denied U.S. Steel and Republic Steel Their Due Process Rights under the Fifth and Fourteenth Amendments.

It was the understanding of both parties in the Court below that the issue before the Three Judge District Court concerned the propriety of class certification, the adequacy of notice to the class members, and the necessity for a three judge district court. When the court proceeded to decide not only those matters but also the merits of the case, the employers, U.S. Steel and

Republic Steel were denied an opportunity to appear and present evidence bearing upon the economic effect of paying benefits (See *Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 115 (1974)). The employers in this case stand to lose substantial sums of money over the next few years if their account is charged as directed by the district court.

The records in this case place the number of claimants at 1,250 which was ascertained by the actual number of claimants that appealed to the Ohio Board of Review. U.S. Steel records indicate that the actual number of workers laid off were 1,402 and Republic Steel records indicate 1,294 workers were laid off. Until the administrative determinations are concluded, the actual number of claimants that would be eligible for benefits if the Ohio statute is struck down can not be determined, however, the potential liability is of great concern, both to the employer whose tax rate will increase, and the Bureau where the funds will have to be depleted. The formula for calculating the amount of monies involved are:

8 weeks (duration of the strike) x $100.00
(average weekly benefits amount) x 2,696 claimants.

The total amount of benefits could be in the sum of $2,156,800.00.

Unlike other forms of social legislation, Ohio's system of Unemployment Compensation is not funded from the General Revenue nor does it depend upon employee contributions; rather, it is funded *in toto* by the *employer*. The amount that each employer must annually contribute is calculated based upon his "experience rating". The "experience rating" refers to the relationship existing between the "positive" or "negative" balance in an employer's account with the state, compared to the number and amount of the charges against it when viewed over a period of time as set by state statute.

When there are charges against an employer's account because of the payment of unemployment benefits to his

employees, the balance in the employer's account necessarily decreases. When this balance drops below a certain sum, the employer's tax rate for the next ensuing year is increased to offset the deficit. By being denied an opportunity to intervene, U.S. Steel and Republic Steel are being deprived not only of their favorable experience rating, which is part of the goodwill assets of their business, but of the money that will be required in future years to recoup their lost level of positive balance.

The involvement of the Three Judge District Court constitutes a denial of substantive due process in that there is no procedure by which a Federal Court may engage in the legislative function of establishing tax rates. Each specific unemployment tax rate classification used in connection with experience ratings is determined by the state legislature based upon the contemplated scope of the state's Unemployment insurance coverage. Each rate contemplates a certain level of statutory disqualification. The judicial elimination of a disqualification disturbs this balance and necessitates a higher tax in order to pay the benefits available under the judicially broadened statute. Not only does this usurp the function of the State legislature but it frustrates the operation of a statutory program by creating, in essence, common law unemployment insurance coverage in an area in which it had neither been contemplated nor provision made for its financing. The increased operating costs thus created would be tantamount to a judicially ordered increase in taxation, which violates the statutory mandate that the tax be established by the legislature. The District Court's decision thus attempts to do what even the Federal Social Security Administration has not chosen to do, in that it attempts not only to determine who will receive unemployment benefits, but at which rate the employer will be taxed. This is in violation of the Tenth Amendment of the United States Constitution.

Further, this is an area in which the court should not attempt to substitute its judgment for the judgment of the

legislature. Debatable questions in respect to the reasonableness of legislation enacted pursuant to the state police power are not for the court but for the legislature. (See *Sproles* v. *Benford*, 286 U.S. 374, 52 S. Ct. 581 (1932)).

E. The Decision of the Three Judge District Court is in Conflict with the Decisions of Other Jurisdictions and Against the Weight of Law and Authority.

In *Chas. C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937) and in *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495, 57 St. Ct. 868 (1937) this court examined the constitutionality of the Unemployment Insurance laws of the state of Alabama and found them to be constitutional. In *Carmichael, supra*, this court examined the types of restrictions that a state might impose upon the payment of unemployment insurance benefits and found them to be constitutional. Included in the law there under examination was a labor dispute disqualification. At page 520 of *Steward, supra*, this court surmised that the basis of a classification concerning the payment or non-payment or unemployment benefits will be deemed reasonable and its constitutionality sustained if any state of facts could be reasonably conceived which would support its selection. In the instant case the three judge district court ignored this doctrine and instead stated that although the State of Ohio had shown several bases upon which a finding of reasonableness might be predicated, namely; the desire of the State to remain neutral in labor disputes and the desire to protect the fund against depletion, the three judge district court held that these bases were insufficient. In so doing the three judge district court below not only ignored caselaw precedent but imposed an impermissibly high burden upon the State of Ohio.

Although it is the position of the Appellant that there is no "federal right" involved in this case and thus no basis for a 42 U.S.C. 1983 action, it must be noted that even if some federal

right does exist, the burden upon the State of Ohio would at most require the showing of a "rational nexus" or "reasonable basis" upon which the classification may be related to an exercise of the state's power.

The information and cases cited herein indicate that the lower court erred in asking for more than was demonstrated by the State of Ohio. The plaintiff below did not allege or prove the existence of any "fundamental constitutional right" such as would be necessary in order to require the State of Ohio to show a "compelling state interest" in maintaining its interpretation of Section 4141.29(D)(1)(a) Ohio Revised Code. Although it may appear harsh to draw the disqualifying line at the point chosen by the State of Ohio, it was within the power of the state to do so and it is not within the province of this court to substitute its feelings and judgment for that of the Ohio legislature. In *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974) at 416 U.S. 1, 8 this court stated that in analyzing economic and social legislation it is for the legislature, and not the courts, to draw the lines of distinction between classes of persons so long as those lines are reasonable.

This court has already upheld the "reasonableness" of a labor dispute disqualification although on somewhat different grounds. In *Unemployment Compensation Commission of Territory of Alaska* v. *Aragan*, 329 U.S. 143, 67 S. Ct. 245 (1946) rehearing denied 329 U.S. 834, 67 S. Ct. 627 (1947) this court upheld a labor dispute disqualification on facts somewhat similar, but not identical to, the facts in the instant case. In that case the Alaska Unemployment Compensation Commission had denied the payment of benefits to a number of Alaska claimants because they had become unemployed due to a "labor dispute" which had arisen in San Francisco, California. In that case a failure on the part of some of the Alaska Canning unions to arrive at a settlement fatally delayed the beginning of operations in a "seasonal industry". The claimants argued that it was not a labor dispute, but the passage of time in this seasonal industry that had led to the workers' unemployment.

These unemployed workers in turn challenged the reasonableness of the application of Alaska's labor dispute disqualification. This court at 329 U.S. 143, 154, 155 ruled that this application of the labor dispute disqualification was a reasonable exercise of state authority. In so stating, this court merely reaffirmed its previous position as stated in *Carmichael, supra*, to the effect that a state system of unemployment insurance need not occupy the entire field or no part of it. In *New York Central Railroad Company* v. *White*, 243 U.S. 188 (1917) this court addressed the analogous area of Workmen's Compensation holding that the exclusion of various classes from coverage under the program worked no constitutional deprivation. Lower courts have upheld both the application of the labor dispute disqualification as then in effect in Ohio and the policy bases asserted in support of it. A representative sampling of these cases must include *Spielmann* v. *Industrial Commission*, 236 Wis. 240, 295 N.W. 1 (1940) in which the Supreme Court of Wisconsin held that an employee who had been employed in an automobile manufacturer's body plant in Milwaukee was not entitled to benefits under the Wisconsin Unemployment Compensation Act where the employee was out of work because of a shutdown caused by a strike at a sister plant. The Wisconsin court found the operations of the two plants to be so closely alligned as to make them functionally one operation. Similarly, in the instant case the function of the Steel Company owned coal mines as sole energy source for the steel companies makes them functionally one operation. In *Chrysler Corp.* v. *Smith*, 297 Mich. 438, 298 N.W. 87 (1941) the Supreme Court of Michigan ruled that where a labor dispute at a main plant caused the suspension of operation of other plants, employees of those other plants could not receive unemployment insurance benefits. The court in that case noted that the Michigan law disqualified workers who were unemployed due to a labor dispute and continued to state that the reasons for this were to preserve the neutrality of the State and to preserve the unemployment compensation trust fund. The court further noted that the state was in effect the "trustee" of a "trust fund" comprised of unemployment compensation monies

and that these funds could only be disbursed in accordance with the terms of the "trust". Similarly in *Abernathy* v. *Eastern Air Lines*, 259 N.C. 190, 130 S.E. 2d 292 cert. denied 375 U.S. 161, 84 S. Ct. 241 (1963) and in *Cornell* v. *Bailey*, 163 Ohio St. 50, 25 N.E. 2d 323 (1955) the Supreme Courts of North Carolina and Ohio upheld the application of the labor disqualification in situation involving separate but functionally integrated operations.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court reverse the decision of the three judge district court or, in the alternative that this Honorable Court reverse the decision of the three judge district court and remand this action for further evidentiary hearings.

Respectfully submitted,

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